UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

JESUS MORALES, Complainant, v. CROMWELL'S TAVERN RESTAURANT, Respondent.	)))) 8 U.S.C. §1324b Proceeding) Case No. 93B00036))))

FINAL DECISION AND ORDER GRANTING MOTION FOR SUMMARY DECISION
(JUNE 10, 1993)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Jesus Morales, pro se.
Joseph Patrick Nilon, President
of Respondent.

I. *Statutory and Regulatory Background*

This case arises under Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §1324b. Section 1324b provides that it is an "unfair immigration-related employment practice" to discriminate against any individual other than an unauthorized alien with respect to hiring, recruitment, referral for a fee, or a discharge from employment because of that individual's national origin or citizenship status. . . ." The statute covers a "protected individual," defined at Section 1324b(a)(3) as one who is a citizen or national of the United States, an alien lawfully admitted for either permanent or temporary residence, an individual admitted as a refugee or granted asylum.

Congress established the new cause of action out of concern that the employer sanctions program, codified at 8 U.S.C. §1324a, might lead to employment discrimination against those who appear "foreign," including those who, although not citizens of the United States, are

lawfully present in this country.[1] Protected individuals alleging discriminatory treatment on the basis of national origin or citizenship must file their charges with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (Special Counsel or OSC). The OSC is authorized to file complaints before administrative law judges designated by the Attorney General. 8 U.S.C. §1324b(e)(2).

IRCA permits private actions in the event that OSC does not file a complaint before an administrative law judge within a 120-day period. The person making the charge may file a complaint directly before an administrative law judge within 90 days of receipt of notice from OSC that it will not prosecute the case. 8 U.S.C. §1324b(d)(2).

II. *Procedural History*

A. Charge and Complaint

On or after September 22, 1992, Jesus Morales (Complainant or Morales) filed a national origin discrimination charge with the Office of Special Counsel (OSC) against Cromwell's Tavern Restaurant (Cromwell's), dated September 22, 1992. Complainant checked off the box for national origin discrimination on OSC's pre-printed Spanish language charge form. The discrimination allegedly occurred on February 22, 1992. On December 21, 1992, OSC sent to Complainant a determination letter in Spanish. OSC advised it does not have jurisdiction over the charge because of the number of persons employed by this employer.[2] In that letter, OSC notified Complainant that despite its determination, he was entitled to file a complaint directly before an administrative law judge within 90 days of receipt of the determination letter. 8 U.S.C. §1324b(d)(3); 18 C.F.R. §44.303(d)(2).

On February 25, 1993, Morales filed a pro se Complaint dated January 20, 1993 with the Office of the Chief Administrative Hearing Officer (OCAHO). Complainant states that he is a citizen of the

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[1] "Joint Explanatory Statement of the Committee of Conference," Conference Report, H.R. Rep. No. 99-100 Cong., 2d Sess. 87 (1986).

[2] "... el Consejero Especial ha determinado que no tiene jurisdiccion sobre su queja bajo de ley dado el numero de personas que emplea este empleador." In the interests of judicial efficiency, this Final Decision and Order hereby requests that OSC transmit its determination letters to charging parties in English as well as Spanish, so that the charging party can transmit an English language version with the complaint. This Order also requests that the Office of the Chief Administrative Hearing Officer require Complainants to file the English version with the complaint.

United States born in Puerto Rico. Complainant alleges discrimination based on hispanic national origin, contending he was "fired for being hispanic since Scurvanover Rest. sold to Cromwels [sic] hispanics employees has been treated differently. To the point to make me feel left out."

B. OCAHO Notice of Hearing and Respondent's Answer and Motion For Summary Decision

On April 12, 1993, OCAHO issued its notice of hearing transmitting the Complaint to Respondent. On May 13, 1993, Respondent filed its Answer together with a Motion for Summary Decision.

Respondent moves for dismissal on the grounds:

> (1) that the Complaint is time barred pursuant to 8 U.S.C. §1324b(d)(3), and
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> (2) that OCAHO lacks jurisdiction over this claim pursuant to the bar of 8 U.S.C. §1324b(a)(2)(b) forbidding overlapping jurisdiction with the Equal Employment Opportunity Commission (EEOC).

Respondent submits that the Complaint is time-barred pursuant to 8 U.S.C. §1324b(d)(3) which directs that "No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with special counsel." The charge at paragraph 6 states the alleged discriminatory discharge occurred on February 22, 1992. The affidavit of Joseph Patrick Nilon, president and owner of Cromwell's, indicates that Complainant left Cromwell's employ on February 22, 1992. Respondent points out that Complainant's September 22 filing of an OSC charge took place more than 180 days after the date of the alleged discrimination. 8 U.S.C. §1324b(d)(3)

Respondent submits also that pursuant to 8 U.S.C. §1324(a)(2)(B), the prohibition against unfair immigration-related employment practice

> . . . shall not apply to -
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> (B) a person's or entity's discrimination because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered under section 2000e-2 of Title 42. . . . (Emphasis added).

Title 42 U.S.C. §2000e-2(a)(1) makes it an unlawful employment practice for an employer:

> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

privileges of employment because of such individual's race, color, religion, sex or national origin. (Emphasis added).

In other words, IRCA jurisdiction attaches to employments in which the employer has between three and fourteen employees. Title VII jurisdiction attaches to employments in which the employer has 15 or more employees. 42 U.S.C. §2000e-(b) & (g).

Respondent's affidavit signed by Cromwell's President states that it employs more than 15 employees and is engaged in an industry affect-ing interstate commerce. Respondent argues that the discrimination, if any, is within the jurisdiction of 42 U.S.C. §2000e-2 and therefore cannot be brought under 8 U.S.C. §1324b(a)(2)(B).

Complainant has not filed a reply to Respondent's Motion for Summary Decision.

III. *Discussion*

A. Summary Decisions

The rules of practice and procedure for §1324b cases before administrative law judges provide for entry of summary decision if the pleadings, other filings by the parties, or matters officially noticed "show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. §68.38(c) [1992].

In the interest of efficient resolution of disputes which do not require an evidentiary confrontation, the Supreme Court has established stan-dards for deciding motions for summary decision. The moving party has the initial burden. The party must identify those portions of materials on file that it believes demonstrate the absence of genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985). The moving party satisfies its burden by showing "that there is an absence of evidence to support the non-moving party's case." Celotex, 477 U.S. at 325. Subsequently, the burden of production shifts to the non-moving party which must set forth by affidavit or as otherwise required, "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 323-4.

For an instructive discussion applying Celotex principles to OCAHO jurisprudence see U.S. v. Lamont Street Grill, 3 OCAHO 441 (7/21/92), citing, T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quoting Fed. R. Civ. P. 56(e)), and citing Kaisser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-4 (9th Cir. 1986), cert. denied, 484 U.S. 1066 (1988)). As

noted in Lamont Street Grill, with respect to specific facts offered by the non-moving party,

> . . . the court does not make credibility determinations, T.W. Electrical Service at 630, or weigh conflicting evidence, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986), and is required to draw all inferences in a light most favorable to the non-moving party. Matsushita Electrical Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).
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> The Supreme Court has stated that Rule 56(c), nevertheless, requires courts to enter summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex at 322. "The mere existence of a scintilla of evidence in support of the [non-moving party's] position is insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." Liberty Lobby, 477 U.S. at 252. The federal courts thus apply to a motion for summary judgment the same standard as to a motion for directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-2.

Lamont Street Grill, 3 OCAHO 441 at 3.

Title 28 C.F.R. §68.38 reflects the principles of Celotex as applied in the caselaw cited.

I conclude that there is no genuine issue as to any material fact determinative of the outcome. I grant Cromwell's motion for summary decision for the reasons stated below.

B. National Origin Jurisdiction

Administrative law judges generally lack jurisdiction over national origin discrimination complaints against employers of more than fourteen individuals.

> It has become commonplace that
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> > jurisdiction of administrative law judges over claims of national origin discrimination in violation of 8 U.S.C. §1324b(a)(1)(A) is necessarily limited to claims against employers employing between four (4) and fourteen (14) employees. Since Respondent employs more than fourteen (14) employees, 8 U.S.C. §1324b(a)(2) (b), it is excluded from IRCA coverage with regard to the national origin discrimination claims.

U.S. v. Marcel Watch Corp., 1 OCAHO 143 (3/22/90) at 11.

See also Huang v. U.S. Postal Service, 1 OCAHO 288 (1/11/91), aff'd, Huang v. U.S. Dept. of Justice, 962 F.2d 1 (list) (2d Cir. 1992); Parkin-Forrest v. Veterans Administration, 4 OCAHO 516, (4/30/93);

Mir v. Federal Bureau of Prisons, OCAHO Case No. 92B00225 (4/20/93)(Order); Yefremov v. New York City Dept. of Transportation, 3 OCAHO 446 (10/23/92)(Order Denying Respondent's Motion for Summary Decision/Miscellaneous Rulings); Curuta v. U.S. Water Conservation Lab, 3 OCAHO 459 (9/24/92), appeal docketed, Curuta v. U.S. Water Conservation Lab., No. 92-70774 (9th Cir. 1992); Brown v. Baltimore City Schools, OCAHO Case No. 91200231 (6/4/92); Palancz v. Cedars Medical Center, 3 OCAHO 443 (8/3/92); Salazar-Castro v. Cincinnati Public Schools, 3 OCAHO 406 (2/26/92); Williamson v. Autorama, 1 OCAHO 174 (5/16/90); Bethishou v. Ohmite Mfg. Co., 1 OCAHO 77 (8/2/89).

Complainant alleges only national origin discrimination. I accept, as unrebutted, Respondent's affidavit. Accordingly, I find that Cromwell's is an employer affecting commerce, employing more than 14 individuals and is covered under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2. Consequently, I lack jurisdiction in this case.

Accordingly, the national origin discrimination claim is dismissed. I do not reach the timeliness issue raised by Respondent.

V. *Ultimate Findings, Conclusion, and Order*

I have considered the pleadings and accompanying documentary support as submitted by the parties. All motions and other requests not previously disposed of, are denied. Accordingly, as more fully explained above, I find and conclude that because Complainant alleges discrimination based exclusively on national origin; that due to the number of individuals employed by Respondent I do not have jurisdiction in this matter; and that therefore this claim is dismissed.

Pursuant to 8 U.S.C. §1324b(g)(1), this Decision and Order is the final administrative order in this proceeding and "shall be final unless appealed" within 60 days to a United States Court of Appeals in accordance with 8 U.S.C. §1324b(i).

SO ORDERED.

Dated and entered this 10th day of June, 1993.

MARVIN H. MORSE
Administrative Law Judge